IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER M FERNSIDE Claimant **C A S H INC** Employer	**APPEAL 16A-UI-11557-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/02/16** **Claimant: Appellant (5)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

Jennifer M. Fernside[1] (claimant) filed an appeal from the October 17, 2016, (reference 01) unemployment insurance decision that denied benefits based upon the determination she voluntarily quit her employment with C A S H, Inc. (employer) on September 5, 2016 when she refused to continue working which is not a good cause reason attributable to the employer. The parties were properly notified about the hearing. A telephone hearing was held on November 8, 2016. The claimant, her grandmother Verna Cook, her grandmother's caretaker Karen Hansen, and friend Jon Herringer participated on the claimant's behalf. The employer participated through General Manager Linda Brown, Crew Member Keegan Clark, Assistant Manager Rebecca Looper, and Owner Craig Scott. Employer's Exhibit 1 was received.

ISSUE:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Crew Member beginning on November 7, 2014, and her last day worked was September 5, 2016. The employer requires employees to notify it of any absences prior to the start of a shift.

The claimant had issues with attendance during 2016. In January 2016, the claimant overdosed and was admitted into the hospital. She notified General Manager Linda Brown of her absence. The claimant had a no-call/no-show absence on May 29, 2016. The claimant missed work from June 2 through 4 of 2016 due to family issues and did not notify management before her shifts; however, Brown agreed she could return to work.

[1] Agency records identify the claimant's last name as "Ferside." However, during the hearing, the claimant stated the correct spelling of her last name was "Fernside."

On June 13, 2016, the claimant's parole officer arrested her for parole violation as she had begun using methamphetamines again and he did not want a recurrence of the January issue. The claimant notified Brown and stayed in contact with her periodically throughout her incarceration. The claimant was released on August 1, 2016. Brown allowed her to return to work, but told her that if she missed more work she would be discharged.

On August 4, 2016, the claimant overdosed again. She was in a coma for a week and missed work. The claimant's friend Jon Herringer notified the employer of her absence and the reason. The employer did not discharge her at that time as the absences were related to a hospitalization.

The claimant left her shift early on September 5, 2016 as she was upset by her work environment and asked her supervisor to tell Brown that she had been directed to leave. The claimant was next scheduled to work September 7, 2016 from 10:00 a.m. to 5:00 p.m. The claimant did not report to work and sent Brown a text message at 4:30 p.m. to notify her that she had missed work due to a headache and asked if she still had a job. Brown spoke to Owner Craig Scott and they made the decision not to let the claimant return to work due to the no-call/no-show absence that day.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit her employment but was discharged due to job-related misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left her employment. *Irving v. Empl. App. Bd.*, 883 N.W. 2d 179, (Iowa 2016), *reh'g denied* (Aug 23, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case, the claimant did walk out on her shift on September 5, 2016, but did not express to anyone an intention to quit her employment. She also remained scheduled for September 7, 2016. The claimant remained in contact with Brown on the 7th to discuss her absence that day. A person who has ended their employment does not typically remain in contact with the employer. Finally, the employer presented conflicting testimony as to whether the claimant quit or was discharged. Brown stated the claimant quit. Scott testified that after the no-call/no-show the decision was made the claimant's employment could not continue. The employer has not met its burden to show the claimant voluntarily quit her employer; therefore, the case will be analyzed as a discharge.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance

benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* Incarceration is not automatically considered an unexcused absence; it depends on whether the individual engaged in conduct which he or she knew or should have known would result in incarceration thereby demonstrating a willful or wanton disregard of the employer's interest. *Irving* at 202.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. The findings of fact show how the disputed factual issues have been resolved.

In 2016, the claimant missed approximately two months of work. Her absences were excessive. The claimant had four no-call/no-show absences which are unexcused because, regardless of the reason, they were not properly reported to the employer. The claimant missed seven weeks of work due to being incarcerated for a parole violation. The claimant was on parole and admitted to using methamphetamines; conduct that she knew or should have known would result in her incarceration. The claimant's absence due to incarceration is unexcused. The claimant left her shift without permission on September 5, 2016 and was absent again on September 7, 2016. The claimant may have been ill that day, but she did not properly report her absence. Both absences were also unexcused.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to

work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

DECISION:

The October 17, 2016, (reference 01) unemployment insurance decision is modified with no change in effect. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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